Noor Azmi bin Ibrahim v Public Prosecutor and other appeals

HIGH COURT (TAIPING) — CRIMINAL APPEAL NOS AB-42JSKS(A)-1–02 OF 2022, AB-42JSKS(A)-2–02 OF 2022 AND AB-42JSKS(A)-3–02 OF 2022
NOOR RUWENA JC
28 MAY 2023

Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged under Sexual Offences Against Children Act 2017 — Appellant convicted and sentenced to 34 years of imprisonment and ten whipping — Whether there were contradictions among testimonies of prosecution witnesses — Whether evidence was uncorroborated — Whether there was delay in making and lodging of police report — Whether there was malicious motive of prosecution witnesses — Whether defence was not properly considered by trial judge — Whether sentences were excessive

There were three appeals by the appellant against the convictions and sentences imposed on him by the sessions court judge ('SCJ') under the Sexual Offences Against Children Act 2017 ('the Act'). The appellant faced three trials for five charges committed against his three daughters ie V1, V2 and V3. In the first trial, the appellant held V1's left breast in one hand and proceeded to grope her left inner thigh. V1 was not comfortable with this conduct and told him so. Her mother ('SP3'), who witnessed this conduct reprimanded him as well. However, the appellant merely shrugged it off. A fight then ensued between SP3 and the appellant and he told SP3 to get out from the house with their children. The next morning, SP3 and all the children (except one of their sons) left the house for her mother's house in Kampung Selabak, Teluk Intan. In the second trial, the victims were V2 and V1. They were watching television with their three other siblings. Suddenly, the appellant grabbed and held V1's breast from behind. V1 shouted at him. SP3 reprimanded the appellant. According to SP3, the appellant sat up and then touched V2's chest. V2 shouted at him and SP3 again reprimanded the appellant. That night, the accused hit his wife for admonishing him about the incident. In the third trial, the victim was V3, the youngest daughter of the appellant. The appellant who was standing in the living room pulled V3's hand towards the sofa. He lied down on the sofa and guided V3's hand to hold his erected penis. SP3 witnessed this from the kitchen. V3 shouted at her father and ran to the kitchen and hid behind her mother. SP3 shouted and the appellant became very angry and wanted to hit V3. Later on 15 October 2019, SP3 lodged a police report after the appellant visited her and the children in Teluk Intan and threatened her. The SCJ was satisfied that the prosecution had proved its case on a maximum evaluation of the evidence in respect of each ingredients of the offences and called for the

appellant to enter his defence. However, the SCJ did not accept his defence in all three trials and considered the appellants' defence as a bare denial and an afterthought. The appellant was to serve a total of 34 years in prison and ten strokes of the rotan. Only the first two sentences were ordered by the SCJ to run concurrently and the rest were to be served consecutively. Hence, this appeal.

Held, dismissing the appeals:

(1) The evidence of the appellant's wife and their three daughters were consistent and they did not contradict each other on material particulars. The evidence was consistent with SP3's testimony that she delayed in making the report as she thought after leaving their house, she and the children would no longer be disturbed by the appellant. There was no confusion at all in reading the report and comparing it with SP3's evidence as she had sufficiently explained the alleged inconsistencies (see paras 26–28).

(2) There were corroborative evidence in the prosecution cases in all three trials. The SCJ had warned herself of the dangers of accepting the unsworn testimony of a child witness and had conducted the steps to determine whether the three children understood the duty the speak the truth and the nature of an oath (see para 32).

(3) SP3 had sufficiently explained the delay in lodging the police report. Hence, there was also no merit on this ground of appeal ie delay in making and lodging of the police report (see para 36).

(4) The appellant did commit the offences charged against him. The testimonies of his wife and children proved that he was very brazen in his actions. The appellant admitted to fighting and hitting his wife often. He would just laugh when admonished by SP3 for groping the children's breasts or touching them inappropriately. He did all these in front of his immediate family members and in the privacy of his home, not in public. There was no evidence of malice or motive to victimise the appellant (see paras 37–38).

(5) The SCJ had clearly addressed the defence of the appellant in all three trials. The SCJ did not make any error in her findings when she concluded that the appellant's children were credible witnesses. Moreover, their evidence were corroborated by SP3. There were no material contradictions and the trial court was right to accept their evidence. With no explanation coming from the appellant on these charges when his defence was called, the SCJ could only conclude that his defence was only a bare denial and afterthought. The SCJ had not misdirected herself because as the trier of fact, she had the benefit of having all the evidence presented before her in order to conclude on the innocence or guilt of the appellant. The SCJ had carefully considered the

evidence put forth by the appellant and tested it against the evidence of the prosecution (see paras 40, 42 & 45). A

(6) The punishment imposed by the SCJ were suitable to the facts and circumstances of the case as well as the gravity of the offence. Moreover, in imposing concurrent and consecutive sentences, the SCJ had also applied her mind to the 'one-transaction principle' and 'totality principle'. Due to the nature and gravity of the crimes committed, public interest would be better served by keeping the appellant away from the victims, and society at large for a longer period of time. The combined sentence was imprisonment for a total of 34 years and ten strokes of whipping. The total maximum sentence for the five charges was 100 years. The total of 34 years' imprisonment did not go against the totality principle. The facts and circumstances of the case did not justify a shorter term of imprisonment nor was it fit to impose concurrent sentences (see paras 59 & 61–63). B C D

[Bahasa Malaysia summary

Terdapat tiga rayuan oleh perayu terhadap sabitan dan hukuman yang dikenakan ke atasnya oleh hakim mahkamah sesyen ('HMS') di bawah Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017 ('Akta'). Perayu menghadapi tiga perbicaraan bagi lima pertuduhan yang dilakukan terhadap tiga anak perempuannya iaitu V1, V2 dan V3. Dalam perbicaraan pertama, perayu memegang payudara kiri V1 dengan sebelah tangan dan terus meraba paha dalam kirinya. V1 tidak selesa dengan kelakuan ini dan memberitahunya begitu. Ibunya ('SP3'), yang menyaksikan kelakuan ini turut menegurnya. Walau bagaimanapun, perayu tidak menghiraukannya. Pergaduhan kemudian berlaku antara SP3 dan perayu dan dia menyuruh SP3 keluar dari rumah bersama anak-anak mereka. Keesokan paginya, SP3 dan semua kanak-kanak (kecuali seorang anak lelaki mereka) keluar dari rumah ke rumah ibunya di Kampung Selabak, Teluk Intan. Dalam perbicaraan kedua, mangsa adalah V2 dan V1. Mereka sedang menonton televisyen bersama tiga lagi adik-beradik mereka. Tiba-tiba, perayu mencekup dan memegang payudara V1 dari belakang. V1 menjerit kepadanya. SP3 menegur perayu. Menurut SP3, perayu duduk dan kemudian menyentuh dada V2. V2 menjerit kepadanya dan SP3 sekali lagi menegur perayu. Pada malam itu, tertuduh memukul isterinya kerana menegurnya mengenai kejadian itu. Dalam perbicaraan ketiga, mangsa ialah V3, anak bongsu perayu. Perayu yang berdiri di ruang tamu menarik tangan V3 ke arah sofa. Dia baring di atas sofa dan membimbing tangan V3 untuk memegang zakarnya yang tegang. SP3 menyaksikan perkara ini dari dapur. V3 menjerit kepada ayahnya dan berlari ke dapur dan bersembunyi di belakang ibunya. SP3 menjerit dan perayu menjadi sangat marah dan ingin memukul V3. Kemudian pada 15 Oktober 2019, SP3 membuat laporan polis selepas perayu melawatnya dan kanak-kanak di Teluk Intan dan mengugutnya. HMS berpuas hati bahawa pihak pendakwaan telah membuktikan kesnya E F G H I

berdasarkan penilaian maksimum terhadap keterangan berkenaan dengan setiap kandungan kesalahan dan meminta perayu membela diri. Walau bagaimanapun, HMS tidak menerima pembelaannya dalam ketiga-tiga perbicaraan dan menganggap pembelaan perayu sebagai penafian kosong dan pemikiran terkemudian. Perayu akan menjalani hukuman penjara selama 34 tahun dan sepuluh sebatan. Hanya dua hukuman pertama diperintahkan oleh HMS berjalan serentak dan selebihnya harus dijalani secara berturut-turut. Oleh itu, rayuan ini.

Diputuskan, menolak rayuan-rayuan:

(1) Keterangan isteri perayu dan tiga anak perempuan mereka adalah konsisten dan mereka tidak bercanggah antara satu sama lain mengenai butiran material. Keterangan selaras dengan keterangan SP3 bahawa beliau menangguhkan membuat laporan kerana beliau berpendapat selepas keluar dari rumah mereka, beliau dan anak-anak tidak lagi akan diganggu oleh perayu. Tidak ada kekeliruan sama sekali dalam membaca laporan dan membandingkannya dengan keterangan SP3 kerana beliau telah menjelaskan dengan secukupnya percanggahan yang didakwa (lihat perenggan 26–28).

(2) Terdapat keterangan yang menyokong dalam kes-kes pendakwaan dalam ketiga-tiga perbicaraan. HMS telah memberi amaran kepada dirinya sendiri tentang risiko menerima keterangan saksi kanak-kanak tanpa sumpah dan telah menjalankan langkah-langkah untuk menentukan sama ada ketiga-tiga kanak-kanak itu memahami kewajipan bercakap benar dan sifat sumpah (lihat perenggan 32).

(3) SP3 telah menjelaskan dengan secukupnya kelewatan membuat laporan polis. Oleh itu, tiada merit atas alasan rayuan ini iaitu kelewatan membuat laporan polis (lihat perenggan 36).

(4) Perayu memang melakukan kesalahan yang didakwa terhadapnya. Testimoni isteri dan anak-anak membuktikan bahawa dia sangat berani dalam tindakannya. Perayu mengaku sering bergaduh dan memukul isterinya. Dia hanya akan ketawa apabila ditegur SP3 kerana meraba-raba payudara anak-anak atau menyentuhnya secara tidak wajar. Dia melakukan semua ini di hadapan ahli keluarga terdekatnya dan dalam privasi rumahnya, bukan di khalayak ramai. Tiada bukti niat jahat atau motif untuk menjadikan perayu mangsa (lihat perenggan 37–38).

(5) HMS telah dengan jelas menangani pembelaan perayu dalam ketiga-tiga perbicaraan. HMS tidak membuat sebarang kesilapan dalam penemuannya apabila dia membuat kesimpulan bahawa anak-anak perayu adalah saksi yang boleh dipercayai. Selain itu, keterangan mereka telah disokong oleh SP3. Tiada percanggahan material dan mahkamah perbicaraan berhak menerima keterangan mereka. Tanpa sebarang

penjelasan daripada perayu mengenai pertuduhan ini apabila pembelaannya dipanggil, HMS hanya boleh membuat kesimpulan bahawa pembelaannya hanyalah penafian kosong dan pemikiran terkemudian. HMS tidak salah mengarahkan dirinya kerana sebagai pembicara fakta, beliau mendapat faedah dengan semua keterangan di hadapannya untuk membuat kesimpulan tentang tidak bersalah atau bersalah perayu. HMS telah mempertimbangkan dengan teliti keterangan yang dikemukakan oleh perayu dan mengujinya terhadap keterangan pihak pendakwaan (lihat perenggan 40, 42 & 45).

(6) Hukuman yang dikenakan oleh HMS adalah bersesuaian dengan fakta dan keadaan kes serta berat kesalahan. Lebih-lebih lagi, dalam menjatuhkan hukuman serentak dan berturut-turut, HMS juga telah menggunakan fikirannya kepada 'prinsip satu transaksi' dan 'prinsip kesetaraan'. Disebabkan oleh sifat dan berat jenayah yang dilakukan, kepentingan awam akan dapat dilaksanakan dengan lebih baik dengan menjauhkan perayu daripada mangsa, dan masyarakat umum untuk tempoh yang lebih lama. Hukuman gabungan adalah penjara selama 34 tahun dan sepuluh sebatan. Jumlah hukuman maksimum bagi lima pertuduhan itu ialah 100 tahun. Jumlah 34 tahun penjara tidak bertentangan dengan prinsip kesetaraan. Fakta dan keadaan kes tidak mewajarkan tempoh pemenjaraan yang lebih pendek dan tidak sesuai untuk menjatuhkan hukuman serentak (lihat perenggan 59 & 61–63).]

Cases referred to

Abdullah bin Atan v PP and other appeals [2020] 6 MLJ 727; [2020] 9 CLJ 151, FC (refd)
Bachik bin Abdul Rahman v PP [2004] 2 MLJ 534; [2004] 2 CLJ 572, CA (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Ganesan a/l Nachiappan & Ors v PP [2000] 3 MLJ 244, CA (refd)
Kanagasuntharam v PP [1992] 1 SLR 81, CA (refd)
Letitia Bosman v PP and other appeals (No 1) [2020] 5 MLJ 277, FC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Mohamed Jusoh bin Abdullah and another v PP [1947] 1 MLJ 130 (refd)
Mohd Khairul Azlan bin Mohd Napi lwn Pendakwa Raya [2021] MLJU 2052, HC (distd)
PP v Mohamed Nor & Ors [1985] 2 MLJ 200b, SC (refd)
PP v Prabu s/o Veeramuthu & Ors [2009] 3 MLJ 838, HC (refd)
Pie Bin Chin v PP [1985] 1 MLJ 234 (refd)
Rosli bin Yusof v PP [2021] 4 MLJ 479; [2021] 7 CLJ 681, FC (refd)

Legislation referred to

Criminal Procedure Code s 112
Evidence Act 1950 s 133A

Penal Code s 376(1)
Sexual Offences Against Children Act 2017 ss 14, 14(a), (b), (c), (d), 16, 16(1), 17, 18

Kaladevi (Sundarajan & Assoc) for the appellant.
Sariza bt Ismail (Deputy Public Prosecutor, Perak State Attorney General's Chambers) for the respondent.

Noor Ruwena JC:

[1] There were three appeals heard together by this court by the same appellant, Noor Azmi bin Ibrahim ('the appellant'). The appeal case numbers were AB-42JSKS(A)-1–02 of 2022, AB-42JSKS(A)-2–02 of 2022 and AB-42JSKS(A)-3–02 of 2022 respectively. He had appealed against the convictions and sentences imposed on him by the Kuala Kangsar Sessions Court under the Sexual Offences Against Children Act 2017 ('the Act'). He faced a total of five charges, registered under three case numbers, which were committed against his three daughters in May and June of 2019. The case numbers at the trial court were AG-61JSK-3–10 of 2019, AG-61JSK-4–10 of 2019 and AG-61JSK-5–10 of 2019, respectively.

[2] To protect the identity of the children, for the purpose of these appeals they will be referred to as V1 (12 years and two months at the time of commission of offence), V2 (two years and five months at the time of commission of offence) and V3 (five years and nine months at the time of commission of offence). The court decided to hear the three appeals together as the victims were the appellant's children wherein the incidents happened around May and June 2019 at their family home in Sg Siput, Perak and the witnesses were their own mother and/or the siblings themselves.

[3] The cases, charges and sentences imposed by the sessions court are summarised as follows:

Case No	Charges	Victim	Date/ Time of Offence	Detail of Charge	Sentence
42JSKS(A) -1–02 of 2022	C1 — s 14(a) SOAC Act 2017	V1 (12 years and two months)	4 June 2019 around 9pm	C1 — held V1's breast (SP4)	C1 — eight years and two strokes
61JSK-3–10 of 2019	C2 — s 14(a) SOAC Act 2017	V1 (12 years and two months)		C2 — held V1's back to thigh (SP4)	C2 — eight years and two strokes

					(from date of arrest 6 October 2019) Concurrently
42JSKS(A) -2–02 of 2022 61JSK-4–10 of 2019	C1 — s 14(a) SOAC Act 2017 AC — s 14(a) SOAC Act 2017	V2 (ten years and five months) V1 (12 years and two months)	4 May 2019 around 6pm	C1 — held V2's chest (SP5) C2 — held V1's chest (SP4)	C1 — eight years and two strokes AC — eight years and two strokes Consecutively after sentences in Case No 61JSK-3–10 of 2019)
42JSKS(A) -3–02 of 2022 61JSK-5–10 of 2019	s 14(b) SOAC Act 2017	V3 (five years and nine months)	7 May 2019 around 6pm	Forced V3 to hold his genitals (SP4)	ten years and two strokes After all other sentences have been served
Key: C denotes Charge C1 denotes Charge 1 C2 denotes Charge 2 AC denotes Additional Charge SOAC Act 2017 — Sexual Offences against Children Act 2017 *All charges were read together with s 16 of the Act					

The orders of witnesses were different in each trial

[4] At the end of the appeals in the High Court on 30 March 2023, the court affirmed the convictions and maintained the sentences given by the learned sessions court judge ('SCJ'). Although the SCJ produced three different grounds of judgment for the trials that were held separately, this court has

prepared only one grounds of judgment for all three appeals for ease of reference since the appeals were heard together and comprised the same issues brought up by the appellant's counsel. A perusal of the three petitions of appeal showed that the same issues were raised against the judgment of the SCJ where it was alleged in 19 paragraphs (Case Nos 1 and 3) and 20 paragraphs (Case No 2), respectively, that the SCJ had misdirected herself on the facts and on the law.

THE PROSECUTION CASES

[5] In Case No 61JSK-3–10 of 2019, V1 was SP4 and her mother was SP3. The incident took place on the night before Hari Raya Aidil Fitri 2019 at the family house. The Investigating Officer, Insp Milda Aren ak Maling was the last witness, SP6. These were the pertinent characters in the first trial. By the time she gave evidence in court, V1 was already 14 years old. The SCJ asked her some questions to determine that V1 understood the nature of the oath. Then the SCJ proceeded to administer the oath to V1 when she was satisfied the child understood the nature of an oath (p 32 of the RRJ2).

[6] According to V1, that night she and her mother SP3 were clearing the used plates after breaking fast in the living area in front of the television. The only other person who was there at the time was the appellant. The rest of the family members were outside, playing fire crackers. Suddenly, the appellant came close to the left side of SP4 and held her left breast in one hand. Then, he proceeded to grope her left inner thigh. V1 was not comfortable with this conduct and told him so. She felt embarrassed by his conduct (pp 34–35 of RRJ2). At the same time, SP3 who witnessed this conduct reprimanded him as well (she saw him holding V1's breast with two hands). SP3 said he was laughing when he was doing that to V1. She said 'apa abang, buat anak macam tu. Kata nak berubah tapi tak berubah jugak'. However, the appellant merely shrugged it off and said 'bukan ada apa, sikit je'. A fight then ensued between SP3 and the appellant and he told SP3 to get out from the house with their children. The next morning, which was the 'pagi raya' SP3 and all the children (except one of their sons) left the house for her mother's house in Kampung Selabak, Teluk Intan while the appellant and one of his sons went for prayers. SP3 told the court she had jotted down the incident in a yellow coloured notebook marked as exh P8 in the trial. SP3 thought the matter has been put to rest then.

[7] However, in the month of October 2019, the appellant paid a visit to SP3 and the children in Teluk Intan. He threatened SP3 and asked for money, since she refused to go back to with him. This caused SP3 fear and distress. Only then a police report Sg Siput/4184/19 was lodged by SP3 on 15 October 2019 which was marked as exh P7. According to the testimony of the

Investigation Officer SP6, Insp Milda Aren anak Maling, when she was given the yellow book she believed it was written by SP3 and she did not need to send it to be examined by a handwriting expert. She said she did not know why the entries made by SP3 were short and brief and did not specifically mentioned the incidences. However, she believed SP3 wrote in a hurry as she was afraid and that SP3 would write about things that happened to her in the book. Based on her investigations, the incidences complained by V1 were committed by the appellant and SP6 denied that the police report was concocted. When she met SP3, the latter looked 'sedih dan sugul'.

[8] Meanwhile, in her cross-examination, V1 answered that when she was younger her father used to touch her but in regard to the incident, she indicated that it was not normal because he touched and groped her breasts. She knew it was wrong when he first touched her like that and she told her mother. When asked whether she knew it was wrong, she said 'Saya tahu. Saya cuma bagi tahu mak untuk kepastian' (p 40 of the RRJ2). V1 agreed she was glad her father was in prison. She did not discuss the incident with her mother while they were in the car to attend court and that 'Mak cuma cakap Mahkamah tidak menakutkan, ok saja'. In re-examination, V1 explained that when she said she would do anything for her mother, she meant because her mother told her to study well and go to university and get a good job.

[9] In the second trial, in the Case No 61-JSK-4–10 of 2019, the victims were V2 and her sister V1 (the victim in the additional charge). V2 gave evidence as SP5 whereas V1 gave evidence as SP4. Their mother gave evidence as SP3. The Investigating Officer, was the last witness, SP7. The incidences occurred on the night before the first day of fasting month Ramadhan 2019 at the family house. By the time she gave evidence in court, V2 was already 13 years old. The SCJ asked her some questions to determine that V2 understood the nature of the oath. Then the SCJ proceeded to administer the oath to V2 when she was satisfied the child understood the nature of an oath (p 45 of the RRJ2).

[10] The victims, V1 and V2, were on the floor of their living room watching television with their three other siblings. The appellant was lying down on the sofa right behind them. Their mother, SP3 was further behind him, also watching television. Suddenly, the appellant grabbed and held V1's breast from behind. V1 shouted at him 'abah, jangan pegang macam ni sakit'. SP3 asked 'kenapa'. V1 replied 'abah pegang dada'. SP3 reprimanded the appellant and he replied 'ala sikit aje, tak ada apa, pegang saja' (p 19, RRJ2). SP3 continued:

> Saya tegur suami saya 'jangan buat macam tu, itu anak perempuan'.
>
> Suami jawab 'tak ada apalah, pegang saja'. Saya nampak keadaan dia macam seronok sebab dia gelak lepas tu.

A Selepas itu, suami saya marah.

[11] According to SP3, the appellant sat up and then touched V2's chest. V2 was sitting next to V1. V2 shouted 'jangan la pegang macam tu abah'. SP3 who witnessed reprimanded the appellant for doing the same thing to V2. She continued 'Kemudian suami marah saya dan anak-anak. Anak-anak jadi tak selesa sebab ayah dia marah-marah. Suami saya marah-marah dan cakap 'buat tu tak boleh, pegang tu tak boleh'. That night, the accused hit his wife for admonishing him about the incident. SP3 told the court that she remembered the incidents and she noted them in the yellow book when he would not be looking. She used to note the incidents in a calendar but when he knew about it, the appellant tore up the calendar. So, SP3 started noting the incidents down in the yellow book. She said in her 18 years of marriage she was not happy and that her husband did not love the children. He was also not 'close' to his other family members. She had sought their advice in the past. They would reprimand him and he would behave for a while. But he would repeat the same thing after that.

[12] Later on, after the incidents on the night before Raya the next month, SP3 lodged a police report, Sg Siput/4184/19 (the same as above) which was marked in the trial as P5. SP3's notes regarding the incident in the small yellow book was tendered by the prosecution. For example, in the second trial, the entry next to the date 4 May 2019 with the word 'Raba' was marked as P6. She explained that the delay in making the report was because after they left for Teluk Intan she thought he would not disturb them anymore. The report was made for their safety and that although she wanted to make a longer report, the policeman at the station told her to just write a short one (p 22, RRJ2). She denied that she concocted her story and the police report because she witnessed the incidents and she had witnesses.

[13] The testimonies of V1 and V2 confirmed SP3's evidence. V2 told the court that she did not directly witness the appellant groping V1. If they were lying, they could have just admitted both saw what the appellant did to V1. Based on the Investigation Officer's investigations, both victims implicated the appellant in the incidents. The SCJ found that there was corroboration in their evidence.

[14] In the third trial, in the Case No 61-JSK-5–10 of 2019, the victim was V3, the youngest daughter of the appellant. V3 gave evidence as SP4 whereas V2 gave evidence as SP5 who witnessed the incident. Their mother gave evidence as SP3. The Investigating Officer, was the last witness, SP7. The offence was committed on incidence occurred on the place the second day of fasting month Ramadhan 2019 at the family house. By the time she gave evidence in court, V3 was already eight years old. The SCJ asked her some

questions to determine that V3 understood the nature of the oath. Then the SCJ proceeded to administer the oath to V3 when she was satisfied the child understood the nature of an oath (pp 29–30 of the RRJ2). A

[15] In this case, the victim V3 was in the living room with three other siblings. The mother SP3 was in the kitchen preparing food for breaking of fast, from where she could see clearly the living room. Suddenly the appellant who was standing in the living room pulled V3's hand towards the sofa. He lied down on the sofa and *menyelak* his *kain sarong* which was the only clothing on him at the time. Then, he guided V3's hand to hold his erected penis. SP3 witnessed this from the kitchen. V3 shouted at her father and ran to the kitchen and hid behind her mother. She described in court that her father's penis was hard when she was forced to touch it during the incident. She said she did not like it when he forced her to touch it. When V3 ran to her mother, SP3 shouted 'Kenapa tu bang?'. The appellant became very angry and wanted to hit V3. SP3 who was cutting onions at the time, quickly hid the knife she was holding as she did not want any untoward incident to happen. However, the appellant saw what she was doing and there was a short struggle between them for the knife. SP3 only lodged police report Sg Siput/4184/19 (the same as above) which was marked in the trial as P7, later on after the last incident the night before Raya. SP3 told the court that she was sad, afraid and did not expect the appellant would do such a thing to V3. SP5 who was in the living room at that time gave evidence that she saw the appellant pulling V3's hand towards his genitals. SP5 however admitted that she did not see his penis. SP7 in her investigations noted that SP5 told her she witnessed the incident. B C D E F

THE DEFENCE CASE

[16] The SCJ was satisfied that the prosecution has proved its case on a maximum evaluation of the evidence in respect of each ingredients of the offences and called for the appellant to enter his defence on all five charges. The appellant was the only witness for his case in all the three trials. However, the SCJ did not accept his defence in all three trials and considered the appellants' defence as a bare denial and an afterthought. She found that he was inconsistent in his defence and was evasive when answering the questions. For instance, in the first trial at first he denied that he was at home at 8pm that night as he had gone out early for 'Tarawikh prayers' but later he admitted he went only for Isya' prayers. The court may take judicial notice that on the last night of Ramadhan before the Hari Raya Aidil Fitri, Muslims do not carry out the 'Tarawikh prayers' as according to the Islamic calendar, the Ramadhan month has ended at dusk on the last day of that month. G H I

[17] In her carefully considered grounds of judgment, the learned SCJ had weighed the appellant's defence and found that he had not raised any

reasonable doubt against the prosecution's case. As it was the defence's allegation that his wife concocted stories to slander him, the SCJ reasoned that he should have called other witnesses to support his contention. It was his version that the only reason he scolded or quarrelled with his wife and chased her out of the house was because of money issues. However, the SCJ considered that if it was really true as he contended that the wife was out to get him because of how he treated her, she would have left the house on her own. The SCJ concluded that the wife's determined action (*nekad*) of leaving the house with the children, because she was worried for their safety when he started molesting their daughters, was corroborative evidence in the prosecution case as she wanted to protect her children.

[18] The SCJ found that based on the prosecution evidence, the appellant had a habit of lounging around the house just wearing his *kain sarong* and when he was aroused, such as in the third trial he grabbed V3's hand to hold his penis. The appellant admitted that on 7 May 2019 he was at home on leave but did not remember what happened that day. Later in cross-examination, he was adamant that he did not commit the offence against V3 and he did not know why they would concoct such stories against him. He also alleged that his in laws liked to meddle in his marriage and therefore, his relationship with his wife soured after that. The SCJ found that the defence in the third trial also did not raise any reasonable doubt on the prosecution case and which was why the SCJ convicted the appellant.

[19] In the second trial, the appellant was asked that as the head of the family he was powerful and that his wife and children would abide by his words. However, he denied that he used the children and took advantage of their young age (vulnerability) as they were easy targets to satisfy his lust. He nevertheless agreed that he did abuse and hit his wife. The SCJ case to the conclusion that after 18 years of enduring an abusive husband, SP3 finally left him when he started sexually abusing their children. He stated that when he was angry, he kept his temper under control. But his own evidence contradicted his story because he admitted that he fought with and hit his wife, which was not convincing at all to support his contention.

EVALUATION AND FINDINGS OF THE COURT

[20] The petition of appeal can be summarised as the following issues raised by the appellant at the hearing of the appeals:

(a) contradictions among the testimonies of the prosecution witnesses;

(b) uncorroborated evidence;

(c) delay in making and lodging of the police report;

(d) malicious motive of the prosecution witnesses; and

(e) defence was not properly considered by the SCJ.

[21] It was also the appellant's contention that the facts of the case did not show that the ingredients of the offence of 'amang seksual fizikal' had been proved. According to the appellant's counsel, 'amang seksual fizikal' or 'physical sexual assault' has been analysed in the case of *Mohd Khairul Azlan bin Mohd Napi lwn Pendakwa Raya* [2021] MLJU 2052 (para 7 of the appellant's submissions). The appellant argued that the offences were allegedly committed in view of the public (ie the family members) and that did not make sense. The facts did not show that there were any apprehension or fear among the children and therefore, it was argued that the ingredients of the offence had not been fulfilled. Mere touching did not constitute a sexual offence. Moreover, counsel for the appellant argued that the positions of the witnesses did not support their story of how the offences were allegedly committed by the appellant.

[22] The SCJ in her grounds of judgment in all three cases had dealt with the ingredients of the charges. She listed the ingredients and went on to consider the evidence adduced by the prosecution in support (refer to RRJ1 for each appeal at pp 14, 19 and 14 respectively). Under the law, s 14 of the Act provides:

> 14 Physical sexual assault on a child
>
> Any person who, for sexual purposes —
>
> (a) *touches any part of the body of a child*;
>
> (b) *makes a child touch any part of the body of such person or of any other person*;
>
> (c) makes a child touch any part of the child's own body; or
>
> (d) does any other acts that involve physical contact with a child without sexual intercourse,
>
> commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding twenty years and shall also be liable to whipping.
>
> Explanation 1 — The act of touching may involve the act of touching with any part of the body or with an object and may be done through anything including anything worn by the person touching or by the child touched.
>
> Explanation 2 — In determining what constitutes sexual purposes, the court may take into consideration, among others, the part of the body that is touched, the nature and extent of the act of touching or the physical contact and all other circumstances surrounding the conduct.

[23] The charges are read with s 16 of the Act due to the appellant being the father of the victims. The provision reads as follows:

> 16 Person in a relationship of trust

A (1) If a person who commits any offence under this Act or any offence specified in the Schedule against a child, is in a relationship of trust with the child, such person shall, in addition to the punishment to which he is liable for such offence, be punished with imprisonment for a term not exceeding five years and shall also be punished with whipping of not less
B than two strokes.

(2) In this section, a person is said to be in a relationship of trust with a child if the child is under his care, supervision or authority, including but not limited tote) a parent, guardian or person who is related through full-blood or half-blood, or through marriage or adoption, including de facto
C adoption; ...

[24] In the three grounds of judgment, the SCJ explained the ingredients to be proved under s 14(a), namely:

D (i) the appellant as the father of the victim;

(ii) for a sexual purpose;

(iii) groped the breast (or other body part) of the victim; and

E (iv) who was a child at the time of the offence.

[25] In respect of the *charge in the third trial which was under* s 14(b), the third ingredient (iii) was that making a child touch any body part of the appellant, namely his penis. Upon perusal of the grounds of judgment, the SCJ
F had considered all the evidence before her upon a maximum evaluation of the prosecution case. Satisfied that the ingredients of each offence had been proved, the SCJ proceeded to call for his defence in all three cases.

Contradictions among the testimonies of the prosecution witnesses

G

[26] The appellant relied on the earlier case of *Mohd Khairul Azlan.* However, that case can be distinguished on the facts. Moreover, there was no written grounds of judgmen because the trial judge had passed away. There were doubts in the prosecution case which the High Court judge on appeal
H found that the prosecution had not discharged the burden of proof. On the day of this court's decision on 30 March 2023, in the broad grounds I had stated that the court found that this ground raised by the appellant was without merit. This was because the evidence of the appellant's wife and their three daughters were consistent and they did not contradict each other on material particulars.
I In regard to the police report lodged by SP3, she had explained that she wanted to write a longer report but was told by the police officer at the *balai* to write a brief report. I will, in this grounds of judgment, elaborate on my findings and the reasons.

[27] Looking at the report P7, it was obvious that SP3 had a lot of things to tell but she had to keep the report short in one paragraph. She started with her complaint that her husband had on many occasions sodomised her until end of May 2019. Then it mentioned the abusive behaviour of the husband and threats to SP3 and their children. After that, she stated the appellant had in the past molested their daughters when she was not at home. Then on 4 June 2019 she was told to leave the house as she had failed to give him money. Lastly, she mentioned that the report was made to seek police protection and monitoring for SP3 and her children from harassment by the appellant. Hence, the court found that this evidence was consistent with SP3's testimony that she delayed in making the report as she thought after leaving their house, she and the children would no longer be disturbed by the appellant.

[28] As a first information report, the contents were sufficient to enable the police to commence investigations against the appellant. Although P7 did not mention the incidents as per the charges framed against him, the report was the basis for the investigations comprising the children as victims of sexual crimes committed by the appellant. SP3 had also given evidence in court that she reprimanded the appellant when he touched and groped V1's breast and then her back to the inner thigh. She said 'apa abang, buat anak macam tu. Kata nak berubah tapi tak berubah jugak'. This statement alluded to the fact that he had done this before to the children and was doing it again after saying that he wanted to change. There was no confusion at all in reading the P7 report and comparing it with SP3's evidence on this issue as she had sufficiently explained the alleged inconsistencies.

[29] Moreover, the SCJ had the benefit of observing the demeanour of the witnesses and she found they were credible witnesses of the truth despite their young age. She had also tested their ability to understand the duty to speak the truth and found that they understood the nature of an oath, even the youngest victim. In regard to SP3, the SCJ found that she was also a credible witness. She may be a simple person but SP3 loved her children very much and was aware of her duties as a mother to protect her children and she did it to the best of her ability. SP3 was a strong and very determined woman who walked out of her marriage in order to save the children, especially the three young girls.

[30] The High Court as an appellate court does not have the advantage of observing the demeanour of witnesses and it is trite that an appellate court would be slow to disturb the findings of the subordinate court on the issue of credibility of witnesses unless the findings made was perverse. In the case of *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232, the court held:

> (7) the credibility of a witness is primarily a matter for the trial judge. The functions of an Appellate Court, when dealing with a question of fact in which questions of

credibility are involved are limited in their character and scope and in an appeal from a decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, an Appellate Court must in order to reverse not merely entertain doubts whether the decision below is right but be convinced that it is wrong. In this case the learned trial judge accepted the evidence of Atun, the prosecution witness, whom he found to be a consistent witness unshaken by very severe cross-examination and the Appeal Court could find no reason to interfere with his assessment.

[31] The case of *Mohd Khairul Azlan* referred to the case of *Pie Bin Chin v Public Prosecutor* [1985] 1 MLJ 234 where it was held:

> *Forgetfulness and failure to recall exactly certain events, which did not seem to be important to the witness, do not necessarily shake his credibility or render other parts of his story unworthy of belief. Various persons are endowed with varying powers of cognition, attentiveness and perception, so that it is not uncommon for two witnesses to a common event to describe it in slightly differing versions.* Thus the slight dissimilarity between the evidence of the complainant and his wife is explicable. It was further contended that the inconsistencies in the evidence of the complainant itself should make his story unreliable. It is true that he gave capricious accounts of certain facts but then those matters relate mostly to subsidiary issues. He was understandably vague on details on sequence of events relating to the payments but of the payments themselves and the amount paid on each occasion the witness's evidence was positive and categorical. I agree with the learned President's findings on this not only because he, having seen and heard the witness is in a better position than I am to evaluate the credibility of the witnesses, but also because I accept that no witness of truth can account for the details of events which had transpired some 17 months previously with precision. (Emphasis added.)

Uncorroborated evidence

[32] This was another ground raised in the petition of appeal. The SCJ found in all three cases that there were ample evidence to corroborate the evidence of the victims. This court agreed with the findings of the SCJ when she found that there were corroborative evidence in the prosecution cases in all three trials. I found that the SCJ had warned herself of the dangers of accepting the unsworn testimony of a child witness and had conducted the steps to determine whether the three children understood the duty the speak the truth and the nature of an oath. Being so satisfied, the SCJ administered the oath upon the children and they all testified 'successfully' in court.

[33] It is trite law under s 133A of the Evidence Act 1950 that when a child of tender years who is called as a witness does not in the opinion of the court understand the nature of an oath, he may give unsworn evidence if the court is satisfied that he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. But the accused

shall not be convicted unless that evidence is corroborated by some material particular in support implicating the accused before he can be convicted. In the case of a sworn child witness, the old rule of prudence applies, viz, the need to give an exhaustive warning on the dangers of convicting on such uncorroborated evidence (Augustine Paul, *Evidence: Practice and Procedure* (4th Ed, Lexis Nexis) at p 1148).

[34] Nevertheless, it must be borne in mind that the 2017 Act also provides for the approach that courts should take in considering evidence of child witnesses. Particularly, ss 17 and 18 are very powerful provisions that the courts may invoke where appropriate. The provisions have been reproduced for ease of reference as follows:

> 17 Presumption as to capacity of a child witness
>
> Notwithstanding anything contrary in any other written law, in any proceedings against any person relating to any offence under this Act, or any offence specified in the Schedule where the victim is a child, a child is presumed to be competent to give evidence unless the court thinks otherwise.
>
> 18 Evidence of child witness
>
> Notwithstanding anything contrary in any other written law, in any proceedings against any person relating to any offence under this Act, or any offence specified in the Schedule where the victim is a child, the court may convict such person of such offence on the basis of the uncorroborated evidence of a child, given upon oath or otherwise.

[35] In the present case, the SCJ also invoked the evidentiary rules in the 2017 Act as stated above. The SCJ mentioned in para 20 that the evidence of victims in a sexual offence cases are very important for the courts to come to a decision and it is often difficult to obtain eyewitnesses as these offences are usually committed away from the watching public. Hence, Parliament's intention in enacting the Act and the evidentiary rules to enable a sexual offender against children to be dealt with accordingly and brought to justice. In the present case, the SCJ had found that the three children were competent witnesses (s 17 of the Act). The learned SCJ had also found the evidence of the prosecution witnesses corroborated each other and did not actually need to apply s 18 of the Act in that regard. She convicted the appellant on all charges because his defence did not raise any reasonable doubt against the prosecution cases, and she had explained why she though his defence were just bare denials and afterthoughts.

Delay in making and lodging of the police report

[36] The court has considered and discussed this ground of appeal in the preceding paragraphs above and found that SP3 had sufficiently explained the

delay in lodging the police report. The fact that SP7 said it was because SP3 did not have transportation was not a material contradiction of SP3's explanation. Hence, there was also no merit on this ground of appeal.

Malicious motive of the prosecution witnesses

[37] One of the appellant's arguments earlier was that these incidents could not have happened. This was because if it was true, the appellant would not have done it in front of the other children or his wife. To my mind, that is too simplistic of an approach. Upon consideration of all the oral evidence in this case (SP3, V1, V2 and V3 and SP7 (Investigation Officer)) and taking into account the demeanour of witnesses on both sides, the SCJ found that the appellant did commit the offences charged against him. I agree with the findings of the learned SCJ. The testimonies of his wife and children (which were not destroyed in their cross-examination) proved that he was very brazen in his actions. The appellant probably thought he could get away with his boorish and vulgar behaviour against the children and his wife. He also admitted to fighting and hitting his wife often. He would just laugh when admonished by SP3 for groping the children's breasts or touching them inappropriately. He did all these in front of his immediate family members and in the privacy of his home, not in public. Therefore, the court also did not find any merits on this issue raised by the appellant.

[38] This brings me to the issue of motive. It was put to the prosecution witnesses that they had a grudge against the appellant and would do anything to see him behind bars. That they would be happy that he remained in prison because he would not be able to disturb them anymore. I have considered the SCJ's evaluation of the children and their mother's testimony. Although they answered that they were happy the appellant was no longer with them, the court did not find any evidence of malice or that they had a motive to victimise him. My reasons are as follows.

[39] The SCJ found that when the victims were testifying, they were able to describe clearly what their father did to them and they were affected by his actions when he sexually molested them. The victims could also recall the incidents as these happened in the month of Ramadhan and before Hari Raya Aidil Fitri. What should be a period of happy occasion and festivities was instead marred by the sexual crimes committed by the appellant against his children. He even tried to hurt his youngest daughter when he wanted to grab the knife from his wife to prevent V3 from relating to her about what he did. Moreover, it was not challenged that SP3 stated she always forgave him for his bad treatment of her but she could no longer stand it when he started sexually abusing their children. Therefore, the appellant also failed on this ground.

Defence was not properly considered by the SCJ

[40] The court found there was no merit on this ground too. Referring to the grounds of judgmen of the SCJ, it could be seen that she had clearly addressed the defence of the appellant in all three trials (see paras 48–60 of the first and second trials and paras 38–50 of the third trial). Nevertheless, the SCJ found that they were only bare denials and after thought. In coming to this conclusion, the SCJ also had correctly applied the relevant case laws on considering defence adduced by an accused.

[41] It was contended by the appellant that mere touching without any sexual connotation was not wrong as he was the children's father. However, looking at the testimonies of V1, V2 and V3, it was obvious that the children did not like the appellant holding and touching their breasts or other body parts because even as children they appreciated that the physical touching and holding of those parts of the body were simply wrong. Referring again to the case of *Mohd Khairul Azlan*, it was stated:

> [54] Mahkamah juga perlu melihat keadaan semasa kejadian sentuhan itu berlaku sama ada ia boleh dijuruskan kepada ianya bermaksud seksual. Sebagai contoh, sekiranya kejadian tersebut berlaku di kawasan yang sunyi dan tanpa terdedah kepada pandangan umum maka ia mungkin boleh dilihat sebagai bermaksud seksual. Begitu juga sekiranya tindakan perayu yang mengunci kenderaan sehingga menyebabkan mangsa tiada peluang untuk melarikan diri ketika berada hanya bersama-sama dengan perayu.
>
> [55] *Apa yang jelas ialah mahkamah perlu melihat keseluruhan keterangan yang dikemukakan. Bagi melihat sama ada ianya mencukupi untuk menunjukkan bahawa sentuhan dan bahagian yang disentuh itu sudah menjurus kepada bermaksud seksual. Ini adalah penting bagi memastikan bahawa sebarang sentuhan yang dibuat terhadap kanak-kanak bukan semestinya boleh dikatakan sebagai satu kesalahan di bawah s 14(a) sebaliknya penelitian lanjut perlu dibuat kepada keterangan bagi mendapatkan keterangan yang jelas bahawa sentuhan tersebut bermaksud seksual. Ia bertujuan bagi menghalang sebarang penyalahgunaan s 14(a) bagi tindakan sentuhan kanak-kanak yang tiada keterangan ianya bermaksud seksual. Pada masa yang sama mahkamah juga perlu memberi perhatian bahawa kejadian sentuhan tersebut adalah melibatkan dua orang iaitu seorang kanak-kanak dan tertuduh. Oleh yang demikian keterangan kanak-kanak tersebut perlu diteliti dengan sewajarnya dan tidak diketepikan begitu sahaja. Oleh yang demikian s 18 dalam keadaan yang sedemikian boleh digunakan dengan tidak mengenepikan kredibiliti saksi tersebut atau percanggahan-percanggahan yang serius yang berlaku di antara saksi kanak-kanak tersebut dengan saksi yang lain.* (Emphasis added.)

[42] The overall facts in the three trials showed that the appellant's children were uncomfortable and did not like what he did to them. They said 'abah, jangan pegang macam tu'. It can be inferred that they were uncomfortable for him to touch a part of their body that was very private. They were all growing

A up at 12, 11 and six years respectively at the material time. Children that age are becoming aware of their body and what would be inappropriate touching by others. V1 and V2 told the court they asked their mother just to confirm that it was inappropriate touching although they already knew it was wrong of their father to touch and hold them like that. Despite their young age, the children B appreciated the sanctity of their body; hence, why should the court ever doubt their credibility in that regard. The SCJ did not make any error in her findings when she concluded that they were credible witnesses. Moreover, their evidence were corroborated by SP3. There were no material contradictions and the trial court was right to accept their evidence. Following from the above, C with no explanation coming from the appellant on these charges when his defence was called, the SCJ could only conclude that his defence was only a bare denial and afterthought.

D **[43]** Credibility of witnesses is one thing and adducing credible evidence to prove each ingredient of the offence charged is another matter. At the prima facie stage, the learned SCJ had on a maximum evaluation of the prosecution case found that the ingredients of the five charges had been proved by the prosecution which had adduced credible evidence against the appellant (for E example, please refer to RRJ1 in the grounds of judgment at paras 5–47 of the first trial). Again, referring to *Mohd Khairul Azlan*'s case, which cited the case of *Abdullah bin Atan v Public Prosecutor and other appeals* [2020] 6 MLJ 727; [2020] 9 CLJ 151 there the Federal Court held that:

> F [43] Section 180(4) of the CPC must be read in light of its context and legislative purpose. By so doing, the phrase 'credible evidence proving each ingredient of the offence' in s 180(4) means that the prosecution may prove each ingredient of the offence either:
>
> (a) by adducing credible direct evidence of that ingredient;
>
> G (b) by drawing inferences of fact, ie, adducing credible circumstantial evidence, from which the ingredient can be inferred; or
>
> (c) by invoking presumptions of law, ie, adducing credible evidence of the relevant basic facts, to invoke a statutory presumption that the ingredient exists.

H **[44]** The burden of proof lies throughout on the prosecution to prove the case beyond reasonable doubt. In the case of *Rosli bin Yusof v Public Prosecutor* [2021] 4 MLJ 479; [2021] 7 CLJ 681 that was also referred to by the learned judge in *Mohd Khairul Azlan*'s case, the Federal Court held:

I

> [45] It is trite law that it is not the duty of the appellant to prove his innocence or to call a particular witness to support his defence (see *Tan Foo Su v Public Prosecutor* [1967] 2 MLJ 19; [1967] 1 LNS 179 and *Sandra Margaret Birch v Public Prosecutor* [1978] 1 MLJ 72; [1977] 1 LNS 114). The law places upon the prosecution the burden to prove guilt of the appellant beyond reasonable doubt and

not on the appellant to prove his innocence. *Well-entrenched in jurisprudence is the rule that the conviction of the appellant must rest not on the weakness of the defence but on the strength of the prosecution. This principle is the corner stone of our criminal law.* (Emphasis added.)

[45] While the SCJ in her grounds of judgment had stated that the appellant did not call any witness to support his defence that his wife and children concocted their story, I did not find that the SCJ had misdirected herself because as the trier of fact, she had the benefit of having all the evidence presented before her in order to conclude on the innocence or guilt of the appellant. On a maximum evaluation of the prosecution case, she found that each ingredient of the offences under s 14(a) and (b) had been proved before calling his defence. The SCJ were convinced that the prosecution witnesses were telling the truth and found them to be credible witnesses. In her grounds of judgment, as I had mentioned above, the SCJ had carefully considered the evidence put forth by the appellant and tested it against the evidence of the prosecution. She did not just pay lip service by saying that she was satisfied the prosecution had proved its case beyond reasonable doubt, as was the situation in *Mohd Khairul Azlan*'s case (where there was no written grounds of judgment).

OTHER ISSUES

[46] I would just touch on a few other issues raised by the appellant such as the yellow book which contained notes made by SP3 (P6) and the sketch plan of the house. The note containing the word 'Raba' next to the date 4 May 2019 in the second trial was submitted to have been added as an afterthought. It was submitted that these documents were not helpful and did not prove the incidents happened. Additionally, in regard to the sketch plan, counsel for the appellant questioned why it was adduced in one of the cases when the Investigation Officer stated it was for another case instead. Upon perusal of the record of appeal (RRJ3 at p 10, second appeal), the court found that the said entry was indeed made by SP3. It could have been that it was written hurriedly as SP3 told the trial court she was afraid of her husband and she could not elaborate on it.

[47] The sketch plan was to assist the court to show the location of the living room (where the incidents were alleged to have been committed), the kitchen and bedrooms. It is not an important document. The strength of the prosecution case was in the credibility of the witnesses whose testimonies withstood extensive cross-examination of the appellant's counsel. The important thing was that the Investigation Officer testified that she had gone to visit the house and stood in the kitchen where SP3 had been preparing food at the table. The Investigation Officer confirmed that she could see the living

room and sofa from where SP3 had stood then. In the last charge, according to SP3, the appellant lied down on the sofa with his legs towards the kitchen. SP3 could see his erection when the appellant *menyelak kain sarong* which he wore at that time. The appellant merely denied this evidence but admitted that he usually wore his *kain sarong* when resting or lounging in the house. Therefore, the appellant could not challenge this evidence and it withstood the cross-examination by his counsel.

[48] The appellant's counsel also submitted that he had been consistent in his defence and it was not an afterthought because he denied everything in his s 112 of the Criminal Procedure Code statement which was tendered as D13 at the trial. The court noted that the statement was taken on 18 October 2019 whereas the appellant was arrested on 16 October 2019. The incidents occurred in May and June 2019. This court deduced from the facts of the case and his background that he had a lot of time to 'prepare his defence' after his wife and children left the family home. When they left him, the appellant in July 2019 filed a summons case against his wife for *nusyuz* (disobedience to the husband). The appellant was a public servant working as a driver at one of the government departments in Enggor, Kuala Kangsar. He was 42 years old at that time. He stood to lose his job and pension if he was convicted of the charges. In my view, he had prepared himself for any eventualities.

[49] Lastly, it was submitted by the appellant's counsel that it was very easy to file charges and allege that he had sexually assaulted his wife and children but it was a difficult allegation to prove. It was also unfair for her client to be made to face the sexual offences charges when they were unsubstantiated. She concluded that if it was true that the appellant had sodomised his wife as she claimed, why were the numerous charges tendered as evidence in D11 at the trial dropped by the prosecution? To my mind, it was the prosecution's prerogative to prosecute or withdraw charges. What the trial court need to do was to examine the evidence adduced in respect of the sexual offences committed on the children and not the withdrawn charges in respect of their mother.

[50] In the case of *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 the Supreme Court stated:

> In this connection, counsel for the appellant had referred to us the case of *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 where Sharma J held that the falsity of the defence does not relieve the prosecution from proving the prosecution's case beyond reasonable doubt. *We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution's case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in Mat v Public Prosecutor* [1963] 1 MLJ 263 *go one step further before convicting the accused by giving due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt in the prosecution case. Thus, even though a judge does not accept or*

believe the accused's explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt in the prosecution case. To satisfy this test it is not so much the words used by the judge, but rather the actual application of the test to the facts of the case that matters. In this case, we found that the learned trial judge offered practically no reason why the defence, notwithstanding its falsity and unconvincing nature, had failed to cast reasonable doubt in the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal. (Emphasis added.)

[51] The SCJ did not believe the appellant's explanation. It is trite law that before convicting the accused, the trial judge must give due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt in the prosecution case. Upon perusal of the three grounds of judgment, this court found that the SCJ had discharged her judicial duties faithfully. The SCJ had analysed the defence case and stated why she did not believe the defence case, where she found that it was merely a bare denial, and had failed to cast reasonable doubt on the prosecution case. Therefore, in accordance with the principles outlined in the case cited above, the SCJ had explained her reasons for not believing the defence raised by the appellant (as discussed earlier in this grounds of judgment). And this court, as the appellate court hearing the three appeals agreed with the findings made by the trial court. Having said that, this court found that the convictions were safe and upheld them accordingly.

SENTENCE

[52] In the case of *Mohamed Jusoh bin Abdullah and another v Public Prosecutor* [1947] 1 MLJ 130, Willan CJ stated:

> In our view no sentence can be assessed by a simple mathematical formula. Many factors must be taken into account according to the circumstances of each individual case. In that respect we would draw attention to the matters which should be taken into account in fixing punishments as set out in *Halsbury's Laws of England* (Hailsham Edition) Vol 9, para 365:
>
> > The Court, in fixing the punishment for any particular crime, will take into consideration *the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation which he has received, if the crime is one of violence,* the antecedents of the prisoner up to the time of sentence, his age and character. (Emphasis added.)

[53] The appellant's counsel submitted that the SCJ had not given due consideration to the mitigation plea. Additionally, she said the sentences were excessive in light of the mitigation put forth. The court was urged, on humanitarian grounds, to reduce the sentence or to order for the sentences to be served concurrently as the appellant was 46 years old and would be 70 by the time he is released from prison. Suddenly, counsel informed the court that the appellant wished to withdraw his appeal against sentence.

[54] Nevertheless, the court allowed the DPP to submit on sentence since the appellant had already submitted on the same. The DPP informed the court that the SCJ did not touch upon s 16 of the Act to impose a heavier sentence although the appellant was in a relationship of trust with the victims. Hence, she urged the court to enhance the sentences given the fact that the appellant was the victims' biological father and clearly fell under the provision of s 16. This is to ensure that the heavier sentence would serve as a lesson to the appellant on the crimes he had committed upon his daughters. However, the appellant's counsel submitted in reply that it would not serve any purpose at all to hold him in prison for a longer period by enhancing the sentence because he should be given a chance to redeem himself and turn over a new leaf.

[55] The aggravating factor in these cases was the fact that the appellant was the victim' own biological father and he had breached the trust as the children's protector. The intention of the Parliament in enacting s 16(1) is to send a message to society at large that this type of crime cannot be taken lightly as it would leave a deep impact on the victim. Whether it is limb (a), (b), (c) or (d) of s 14, they all carry the maximum sentence of 20 years' imprisonment and whipping, similar to the punishment for an offence of rape under s 376(1) of the Penal Code.

[56] Section 16(1) is very straightforward and the plain meaning of it is that when a person has been convicted of an offence under s 14, it becomes mandatory to impose a heavier sentence on the offender. It all has to do with the rationale or spirit of the legislation. Has the SCJ done this before imposing the sentences and ordered them to run consecutively? I had considered in the grounds of judgment at para 68 of the first trial, for example, the SCJ had addressed her mind to the fact that the appellant was the father of the victim. Therefore, during the hearing I considered that the SCJ had taken this into consideration when imposing the sentences upon the appellant. Since the DPP did not cross-appeal on sentence, I did not exercise the court's powers to enhance the sentences since the appellant would need to serve a total of 34 years in prison and ten strokes of the *rotan.* Only the first two sentences were ordered by the SCJ to run concurrently and the rest were to be served consecutively. Although he has not shown any remorse, it is hoped that the long period of imprisonment would serve for him to turn over a new leaf and become a better person and father to his six children.

[57] In the case of *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277 which stated the following:

> [125] *In passing sentence, the court takes into consideration the mitigating and aggravating factors in order to ensure that the sentence is in accordance with the law.* Passing a sentence according to law means the sentence imposed must not only be within the ambit of the sentence period stipulated but also assessed and passed

according to established judicial principles (see *Jafa bin Daud* at p 316 of the judgment of Mohamed Azmi J). (Emphasis added.)

[58] In the case of *Ganesan a/l Nachiappan & Ors v Public Prosecutor* [2000] 3 MLJ 244 the court held:

(1) The power of sentencing given to a trial court is a discretionary one and in order for the appellate court to disturb the sentence imposed, the court must be convinced that the trial judge had erred in applying the correct principles of sentencing or had embarked on some unauthorised or extraneous exercise of discretion. In the present case, the trial judge in his judgment had given due consideration, inter alia, to the plea of guilty, the ages of the appellants and the period they were remanded before passing the sentence on them (see p 246B-C).

[59] It is trite law that an appellate court would be slow to interfere or disturb a sentence passed by a lower court unless it is manifestly wrong in the sense of being illegal or unsuitable to the proved facts and circumstances: *Public Prosecutor v Mohamed Nor & Ors* [1985] 2 MLJ 200b. In this case, the punishment imposed by the SCJ were suitable to the facts and circumstances of the case as well as the gravity of the offence. Moreover, in imposing concurrent and consecutive sentences, this court considered that the SCJ had also applied her mind to the 'one-transaction principle' and 'totality principle'.

[60] In regard to the 'one transaction rule' principle, the five charges to a certain extent satisfied the criteria of proximity of time, proximity of place, continuity of action and continuity of purpose or design although they were carried out on three different victims. In the case of *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534; [2004] 2 CLJ 572 Augustine Paul JCA (as he then was) stated:

... The exercise of the discretion to determine the date of commencement of the sentence of imprisonment is dependent on the facts and circumstances of each case. *In deciding whether the terms of imprisonment should be consecutive or commence at another date the court will be guided by the one transaction rule and the totality principle.* Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction all sentences in respect of these offences should be concurrent rather than consecutive (see *R v Saleem* [1964] Crim LR 482 *R v Walsh* [1965] Crim LR 248). *For there to be one transaction four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 88; [1979] 1 LNS 36; *Amrita Lai Hazra v Emperor* 42 Cal 957; *Chin Choy v Public Prosecutor* [1955] 1 MLJ 236; [1955] 1 LNS 17*). The rule, however, is not absolute.* As Yong Pung How CJ said in *Kanagasuntharam v Public Prosecutor* [1992] 1 SLR 81 at p 83:

> *The English courts have recognised that there are situations where consecutive sentences are necessary to discourage the type of criminal conduct being punished: see R v Faulkner* [1972] 56 Cr App R 594, *R v Wheatley* [1983] 5 Cr App R (S) 417

A *and R v Skinner* (1986) 8 Cr App R (S) 166. *The applicability of the exception is said to depend on the facts of the case and the circumstances of the offence.* It is stated in broad and general terms and although it may be criticised as vague, it is necessarily in such terms in order that the sentencer may impose an appropriate sentence in each particular case upon each particular offender at the particular time the case is heard. (Emphasis added.)

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[61] I have referred to *Bachik bin Abdul Rahman* and *Public Prosecutor v Prabu s/o Veeramuthu & Ors* [2009] 3 MLJ 838 in my previous judgment which decided that the 'one transaction rule' was not absolute. The court C should look at whether the commission of the crimes involved elements such as cruelty, violence and fear. In the present case, the appellant in the third trial struggled with his wife to grab the knife she was hiding because he was angry at V3 who tried to tell her mother about what he did to her (V3). I have also considered the evidence in the first and second trial that the appellant appeared D to be 'seronok' when he held his daughters' breasts (V1 and V2). Moreover, when SP3 admonished him, he would just brushed it aside lightly. There was no remorse at all shown. I was concerned that the appellant, by his actions of sexually abusing his young daughters, was exposing or 'grooming' them for more intimate sexual relations in the future. He thought nothing at all about E touching and holding their breasts and even laughed when admonished by his wife. He said 'ala sikit aje, tak ada apa, pegang saja' (p 19, RRJ2). And then SP3 continued to tell him off 'Saya tegur suami saya 'jangan buat macam tu, itu anak perempuan'. This clearly referred to the fact that SP3 told him it was inappropriate to touch a daughter in that way. The appellant replied 'tak ada F apalah, pegang saja'. SP3 saw that he appeared to be amused by his actions. It can be inferred that the appellant, by touching and holding his daughters inappropriately, were making them feel such acts were normal and not wrong. It took a brave woman to put a stop to the appellant's inappropriate behaviour before things got out of hand. The court opines (coming to the same G conclusion as the SCJ) that due to the nature and gravity of the crimes committed, public interest would be better served by keeping the appellant away from the victims, and society at large for a longer period of time.

[62] Arguably the long period of incarceration could have a crushing effect H on the appellant, he would not be in this predicament had the appellant thought about the consequences before he committed the offences against the victims who were his own biological daughters. This court views that a stiffer punishment of a longer term of imprisonment would have been better for the victims but this was not sufficient, per se, to warrant this court's interference I because regard must also be had to the 'totality principle'. In the present case, the combined sentence is imprisonment for a total of 34 years and ten strokes of whipping. The total maximum sentence for the five charges is 100 years. The 'totality principle' which was discussed in *Bachik bin Abdul Rahman*'s case by Augustine Paul JCA cited that principle as explained by Yong Pung How CJ in

Kanagasuntharam v Public Prosecutor [1992] 1 SLR 81 (at p 85) to the view of DA Thomas in *Principles of Sentencing* (2nd Ed) at pp 57–58 as follows:

> The many decisions of the court in which the totality principle has been applied to explain the reduction of a cumulative sentence made up of correctly calculated individual parts suggest that the principle has two limbs. A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences involved, or if its effect is to impose on the offender 'a crushing sentence' not in keeping with his records and prospects.

[63] The total of 34 years' imprisonment did not go against the totality principle. The rationale of the SCJ was that the court must show its abhorrence to the rampancy of crimes of a sexual nature committed against children and therefore, a deterrent sentence was warranted. This court opines that the facts and circumstances of the case did not justify a shorter term of imprisonment nor was it fit to impose concurrent sentences as counsel for the appellant had pleaded. Having examined the relevant case law on the principles in regard to consecutive and concurrent sentences and the 'crushing effect' on the prisoner, this court was not swayed by the appellant's submissions for a more lenient sentence.

[64] Before I conclude, it is worth noting that 'amang seksual fizikal' or 'physical sexual assault' is part of the larger offence of 'sexual grooming' when committed on a child. The provisions in the Act have been drafted to cater to such situations, to the minutest detail.

[65] Sexual grooming is also recognised in other countries. In an entry in the State of Victoria, Australia website: 'Grooming is when a person engages in predatory conduct to prepare a child or young person for sexual activity at a later time. Young people are often 'groomed' before they are sexually abused. At first they may be tricked into thinking they are in a safe and normal relationship so they may not know it's happening or may feel they have no choice but to be abused'.

CONCLUSION

[66] Premised on the above considerations, this court did not find any error of fact or law which justified appellate interference upon the findings, convictions and sentences of the sessions court. Accordingly, the court affirmed the convictions and sentences imposed upon the appellant.

Appeals against convictions and sentences dismissed.

A *Appeals dismissed.*

Reported by Nabilah Syahida Abdullah Salleh

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